

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY BETH STRANGE

Claimant

VS.

U.S.D. 512

Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. 1,036,630

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 26, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Dennis L. Horner, of Kansas City, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that the evidence submitted did not prove by a preponderance of the evidence that claimant's carpal tunnel syndrome was caused or aggravated by the single traumatic accident in this case. Accordingly, the ALJ denied claimant's request for medical treatment for her carpal tunnel condition.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 25, 2009, Preliminary Hearing and the exhibits; the transcript of the December 26, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that the evidence is clear that she was symptom free in her neck, right shoulder and right hand until her accident of February 12, 2007. Therefore, claimant asserts her cervical and right hand conditions are compensable injuries.

Respondent argues that the ALJ did not err in denying claimant's request for medical treatment relating to her right upper extremity carpal tunnel syndrome, as the medical evidence shows her carpal tunnel condition is unrelated to her February 12, 2007, work accident.

The issue for the Board's review is: Was claimant's right carpal tunnel syndrome caused or aggravated by her work accident of February 12, 2007?

FINDINGS OF FACT

Claimant has worked for respondent as a special education paraprofessional for seven years. On February 12, 2007, she was assisting a student who was riding a tricycle in the hallway. When the student veered toward a wall, she grabbed the handlebar of the tricycle and pulled him away from the wall. When doing so, she immediately felt a burning sensation from her neck down to her fingers. She testified that she had never had any previous complaints in the areas of her neck, right shoulder, right forearm, right wrist, or right hand and fingers before this accident. She immediately sought treatment with the school nurse and was referred to Dr. Tyann Hamedi.

When claimant saw Dr. Hamedi on February 12, 2007, she complained of pain in her right shoulder with a burning sensation and discomfort in the right side of her neck. She also told Dr. Hamedi that she had numbness and tingling off and on in the third and fourth fingers. Dr. Hamedi continued to treat her shoulder and cervical strain, but her medical note of March 8, 2007, stated that she believed the numbness in claimant's fingers was a separate condition.

Claimant was referred to Dr. Robert Sharpe, an orthopedic surgeon. Claimant first saw Dr. Sharpe on March 15, 2007. She testified that she told Dr. Sharpe about her cervical and wrist conditions, but he did not provide her with any treatment for either complaint. He provided claimant with treatment only for her right shoulder injury. His March 15, 2007, office notes state that claimant had undergone an EMG that revealed carpal tunnel syndrome that appeared to be longstanding. On April 27, 2007, Dr. Sharpe performed arthroscopic surgery on her right shoulder for a torn rotator cuff. He found she was at maximum medical improvement on September 4, 2007, and she was released to return to work with no restrictions.

On November 28, 2007, claimant was evaluated by Dr. John Pazell, an orthopedic surgeon, at the request of claimant's attorney. Claimant told Dr. Pazell that her hand goes numb, especially at night, and that this did not occur before her injury. Dr. Pazell noted that Dr. Basinah Khulusi, who had performed the EMG on claimant, believed claimant's carpal tunnel syndrome was probably aggravated by her recent injury. After examining her, Dr. Pazell concluded that her wrist condition was related to her February 12, 2007, accident and recommended that she have carpal tunnel release.

A preliminary hearing was held on December 26, 2007, at which time claimant was asking for treatment for her cervical condition and her right carpal tunnel syndrome. The ALJ ordered respondent to provide claimant with names of three orthopedic surgeons from which she could choose one to be her authorized physician for the purpose of evaluating and treating her cervical condition. However, the ALJ found that as of the date of the

preliminary hearing, there was not a preponderance of evidence to prove that claimant's carpal tunnel syndrome was caused by the February 12, 2007, accident. The ALJ suggested to the parties that it would be helpful to obtain an opinion from the new authorized medical provider concerning whether claimant's carpal tunnel syndrome is related to the work accident.

On February 29, 2008, claimant was seen by Dr. Alexander Bailey, who referred her to a hand surgeon, Dr. Anne Rosenthal. Dr. Bailey continued to see claimant for her cervical complaints, and on March 26, 2008, noted that he had no specific evidence that claimant's carpal tunnel syndrome had an acute onset.

Dr. Rosenthal saw claimant on April 7, 2008, and ordered a repeat EMG, which revealed that claimant's had severe right carpal tunnel syndrome. Concerning causation, Dr. Rosenthal's report of April 8, 2008, states:

I do want to note that [claimant's] date of injury is February 12, 2007, and the first nerve test that was obtained was on February 27, 2007. It is impossible to develop at least moderate carpal tunnel syndrome on nerve test from an event that happened fifteen days before. I do want to note that one cannot conclude if the carpal tunnel syndrome was severe, because the abductor pollicis brevis was not studied on Dr. Khulusi's nerve test. It does take at least six weeks to develop nerve changes from a nerve compression.

...
Certainly she does have preexisting carpal tunnel syndrome, which she may have aggravated from this event.¹

In an April 9, 2008, letter, Dr. Rosenthal stated that claimant's carpal tunnel syndrome preexisted and was unrelated to her February 12, 2007, accident.

On October 8, 2008, claimant was seen by Dr. Lynn Ketchum, an orthopedist with a specialty in hand surgery, at the request of claimant's attorney. Dr. Ketchum diagnosed claimant with severe carpal tunnel syndrome and opined she should have carpal tunnel release in the near future. He stated further:

The problem is the issue of causation because it is unlikely that the episode where she grabbed the child's tricycle and got the pain in her neck and shoulder caused the carpal tunnel. It is more likely that it is from the repetitive use of her hands in her job over that period of time. I might add at this juncture that she does not perform any sports or hobbies of a repetitive nature, and had no problems with her thumb until this incident, in February 2007. I think that this has probably been brewing for a long time, because of the repetitive work that she does in her job, and that incident was the straw that broke the camel's back. . . .

¹ P.H. Trans. (Feb. 25, 2009), Resp. Ex. B at 3.

....
At this time, her diagnosis is severe right carpal tunnel syndrome which I feel is a work-caused condition, aggravated by the incident in February 2007

At the preliminary hearing held on February 25, 2009, claimant testified that she had never had any numbness, tingling, or weakness in her right hand before her accident of February 12, 2007, nor had she experienced pain or discomfort for longer than a few minutes. She said that since the December 2007 preliminary hearing, her right wrist condition has worsened and she now has constant aching, numbness and tingling, and that the condition has spread from just her two fingers and is now also in the palm of her hand in the area of her thumb. She also has complaints in her right elbow.

Claimant has continued to work for respondent since her accident. She described her work with physically and mentally challenged children, saying one child needed to be lifted from her wheelchair to a standing position several times a day. With another child, she is required to hold onto his gait belt while he walks. She testified she is constantly using her hands to hold, lift, support and keep the children steady. This was true before and since her accident. However, it was only after the accident that she started having the problems with her right upper extremity.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.² Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

² K.S.A. 2008 Supp. 44-501(a).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁴

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁵ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁶ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁷

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

Respondent admits claimant suffered personal injury by accident on February 12, 2007, that arose out of and in the course of her employment. Although claimant reported symptoms in her neck, shoulder, arm, wrist, hand and fingers, respondent only authorized treatment of claimant's shoulder. Following a preliminary hearing in December 2007, the ALJ ordered respondent to provide claimant with treatment for her neck, but the ALJ did

⁴ *Id.* at 278.

⁵ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁶ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁷ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

⁸ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

⁹ K.S.A. 2008 Supp. 44-555c(k).

not order respondent to treat the claimant's carpal tunnel syndrome. Now claimant is again seeking treatment for her hand and wrist.

Although the positive carpal tunnel syndrome results from the EMG performed in February 2007 mean that claimant's carpal tunnel syndrome condition preexisted the February 2007 accident, the condition had been asymptomatic. The accident clearly aggravated claimant's carpal tunnel syndrome symptoms. The medical opinions of Dr. Pazell and Dr. Ketchum, in particular, support claimant's contention in this regard. Based on the record presented to date, this Board Member finds that claimant's carpal tunnel syndrome condition is compensable as an aggravation of a preexisting condition.

CONCLUSION

Claimant has met her burden of proving that she suffered personal injury to her right hand and wrist in the accident of February 12, 2007, and that her need for medical treatment for her carpal tunnel syndrome condition is causally related to that accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated February 26, 2009, is reversed, and this matter is remanded to the ALJ for further orders on claimant's request for medical treatment.

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Karl L. Wenger, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge